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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1080 48

UNIVERSAL OIL PRODUCTS COMPANY,

Petitioner,

vs.

ROOT REFINING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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IN THE

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No.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

vs.

ROOT REFINING COMPANY;
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, UNIVERSAL OIL PRODUCTS COMPANY, prays that a writ of *certiorari* issue to the United States Circuit Court of Appeals for the Third Circuit to review an order of the said Circuit Court of Appeals, which was entered on December 29, 1944, as a result of an investigation conducted at the behest of certain attorneys, termed *Amici Curiae*, and captioned in a consolidated cause entitled "*Root Refining Company, Defendant-Appellant; vs. Universal Oil Products Company, Plaintiff-Appellee*", which said order directed that *Amici Curiae* be allowed the

sum of $100,000 as compensation for their services in said investigation and the sum of $54,606.57 as expenses incurred by them in said investigation and that the said sum of $154,606.57 be taxed against your petitioner, together with costs of the proceedings in that court.

A certified transcript of the record of the proceedings in the investigation, including the proceedings before said Circuit Court of Appeals, is furnished herewith in compliance with Rule 38 of this Court.

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925 (28 U. S. C. § 347)*. The order, of which review is sought, was entered on December 29, 1944 (v. IX, p. 3692).**

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Your petitioner, Universal Oil Products Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, having its principal place of business at 310 South Michigan Avenue, Chicago 4, Illinois. All of the stock and other securities of petitioner are now owned by Guaranty Trust Company of

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*Petitioner has filed simultaneously herewith a motion for leave to file a petition for writ of *certiorari*, in which it invokes the jurisdiction of this Court under Section 262 of the Judicial Code (28 U. S. C. § 377) *and has prayed that the Court consider and decide that application prior to the determination of this petition.*

**References are to the certified transcript; Roman numerals refer to volume and Arabic numerals to page.

New York, as Trustee,* under the terms of a deed of trust, dated October 26, 1944, for the creation of "The Petroleum Research Fund", the present named beneficiary thereof being the American Chemical Society; the income received from such trust by the beneficiary is to be used exclusively for advanced scientific education and fundamental research in the petroleum field; every patent, United States or foreign, that shall be taken out by or on behalf of the beneficiary or by or on behalf of any individual or institution acting at the direction of or on behalf of the beneficiary in carrying out such research is to be immediately dedicated to the public, royalty free.

The Circuit Court of Appeals for the Third Circuit, as will hereinafter more fully appear, assumed jurisdiction, took certain action, and entered certain orders wholly beyond the power and authority of said court. The action taken, jurisdiction assumed, and orders entered purport to arise out of a consolidated cause entitled "*Root Refining Company, Defendant-Appellant*, vs. *Universal Oil Products Company, Plaintiff-Appellee*" (hereinafter sometimes

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*Since the acquisition of your petitioner's stock and other securities by Guaranty Trust Company of New York, as Trustee, as above set forth, a board of directors has been selected, wholly independent of and not beholden to any interests adverse to the purposes of said trust.

Your petitioner has for many years made available, at constantly voluntarily decreased license fees, the latest developments and discoveries in design, process and practice in the hydrocarbon field, particularly in the refining art, to all desiring the same. It has thereby enabled numerous refining companies, particularly the smaller companies, lacking their own experimental and laboratory facilities, to enjoy the advantage of the latest developments in the refining art and thereby to deal competitively with those petroleum companies possessing their own laboratories and development facilities.

referred to as "the *Root* case") heard and determined on appeal in 1935 by the Circuit Court of Appeals for the Third Circuit; said action taken, jurisdiction assumed, and orders entered were all upon the application of one or more attorneys-at-law, namely, Arthur C. Denison, J. Bernhard Thiess, Thorley von Holst and Arthur G. Logan, described as *Amici Curiae*, none of whom was a party to or the attorney or representative of any party to that cause; indeed, that cause had been settled and had become wholly moot prior to the date upon which the said applications were made; nevertheless, as will hereinafter more fully appear, the said Court of Appeals assumed jurisdiction upon the petition of said attorneys, entered an order appointing a Master to investigate and report with respect to whether certain judgments in said consolidated cause were tainted by fraud, confirmed the Master's report finding that such judgments were so tainted by fraud, directed that they be set aside and said appeals be set down for reargument, and, most recently, based upon the foregoing action, entertained a petition by two of said attorneys, namely, J. Bernhard Thiess and Thorley von Holst, and made an order allowing said attorneys the sum of $100,000 as compensation for their services and the sum of $54,606.57 as expenses, and directing that the said sum of $154,606.57, together with costs in the said Court of Appeals, be taxed against your petitioner; said allowances and expenses having already been paid to said attorneys by their clients, the said payments constitute a reimbursement of said clients.

At the outset, we emphasize that the issue, which will be submitted to this Court if this writ is granted, is not whether or not the Master would have been justified, in a legally cognizable proceeding, in recommending that the

Root judgments be set aside, or whether or not the Court of Appeals would have been justified, in a legally cognizable proceeding, in confirming the Master's report, adopting his findings of fact and conclusions of law, setting aside the *Root* judgments, and entering said order on December 29, 1944. Those questions should be reserved for determination in a proper proceeding constituting a case or controversy within the meaning of Article III, Section 2, of the Constitution of the United States, in which adverse parties appear before a legally constituted tribunal, in which the established rules of law are applied.*

Rather, the issue before this Court will be the narrow one of whether or not the Court of Appeals had any jurisdiction in the instant proceeding to enter any order or decree whatever or to take any action whatever binding on your petitioner or affecting its property rights or judgments.

The *Root* case was a consolidation of two actions brought in 1929 and 1931, respectively, by your petitioner's predecessor in interest against Root Refining Company (hereinafter referred to as "Root") in the United States District Court for the District of Delaware, alleging infringement by Root of two of your petitioner's patents, namely, United States Letters Patent No. 1,392,629, Carbon P. Dubbs, granted October 4, 1921, and United States Letters Patent No. 1,573,592, Gustav Egloff, granted May 12, 1925.**

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*We have confidence that in such a proceeding the *Root* judgments would not, and could not, be found to have been obtained by fraud.

**These patents have recently been the subject of an interpretation by this Court in *Universal Oil Co.* v. *Globe Co.*, 322 U. S. 471.

The *Root* case came on for trial in the District Court in 1932 before Honorable John P. Nields, District Judge, who, on April 27, 1934, rendered an opinion in favor of your petitioner sustaining the validity of the Dubbs and Egloff patents and finding that both patents were infringed by the accused Winkler-Koch process practiced by Root (6 F. Supp. 763). An interlocutory decree for an accounting and a permanent injunction was entered on that decision on May 18, 1934.

Appeals were taken by Root to the Circuit Court of Appeals for the Third Circuit and the cause was argued on January 7, 1935, before Circuit Judges Joseph Buffington, J. Warren Davis and J. Whitaker Thompson. The decree of the District Court was unanimously affirmed on June 26, 1935, by the Circuit Court of Appeals for the Third Circuit, with an opinion by Circuit Judge J. Warren Davis (78 F [2d] 991). A petition for rehearing was filed in the Circuit Court of Appeals and was denied on August 6, 1935 (78 F. [2d] 991). A petition for a writ of *certiorari* was filed in this Court on September 3, 1935, and was denied on October 21, 1935 (296 U. S. 626).*

In February, 1936, your petitioner, pursuant to leave of the District Court, set up, by way of supplemental bills in the *Root* case, the assignment to it by its predecessor in interest of the Dubbs and Egloff patents and the claims for damages for the infringement thereof and was substituted as plaintiff in place of its predecessor in interest.

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*The transcript of the original consolidated cause was, by stipulation (v. VI, p. 2488), deemed a part of the record in the investigation hereinafter described and is on file with the Clerk of this Court (Nos. 417 and 418, October Term 1935; 296 U. S. 626). Your petitioner begs leave to refer thereto without the necessity of reprinting the same.

Thereafter and as of April 1, 1939, your petitioner and Root entered into a settlement of the controversy existing between them, whereby your petitioner waived its right to the accounting directed by the interlocutory decree, and your petitioner and Root entered into a license agreement granting Root the right to use certain of your petitioner's patents upon the payment of a stipulated license fee. The aforesaid settlement fully and completely disposed of the controversy between your petitioner and Root, although no order was entered dismissing the bill or vacating the injunction.

In 1941 Federal grand jury proceedings resulted in the indictment in the Eastern District of Pennsylvania of William Fox, the former motion picture magnate, former Circuit Judge J. Warren Davis, and one Morgan S. Kaufman, a Scranton, Pennsylvania, lawyer, charging an illegal conspiracy to obstruct justice in connection with William Fox's personal bankruptcy proceedings which had been commenced in the Third Circuit in 1936. William Fox pleaded guilty. Davis and Kaufman were tried twice, the jury upon each occasion disagreed, and after the second trial the indictment as to them was *nolle prossed*. At the first trial of Kaufman and Davis, testimony was adduced from which it appeared that the said Kaufman was retained by petitioner in 1932; that Kaufman was paid in the fall of 1935 by petitioner, as a general retainer for the years 1932, 1933, 1934 and a part of 1935, the sum of $25,000; that Kaufman was not an attorney of record in the *Root* case and was not active in that case; and that shortly after he had been paid by petitioner said Kaufman loaned the sum of $10,000 to a cousin of Judge J. Warren Davis upon the

security of a mortgage upon certain Florida real estate* (v. I, pp. 9-11).

The late Arthur C. Denison,** J. Bernhard Thiess and Thorley von Holst had represented Root as attorneys of record in the *Root* case and in 1941 were representing several other refining companies, then using the Winkler-Koch process practiced by Root, against all of which suit had been brought by your petitioner for infringement of its Dubbs and Egloff patents; the said attorneys followed the proceedings in the criminal trial closely.

Under date of June 2, 1941, the said attorneys addressed the following letter to the late Thomas G. Haight, William F. Hall, Charles M. Thomas and Hugh M. Morris, counsel of record for your petitioner in the *Root* case (v. I, pp. 2-3):

> "Gentlemen:
>
> "Please be advised that on Thursday, June 5, 1941, at 3:30 P.M., Daylight Savings Time, we shall appear before the Judges of the Court of Appeals for the Third Circuit at Philadelphia, Pennsylvania, either in chambers or in the courtroom, as the Court may direct, and shall present to the Court the question of whether or not an investigation should be directed, in such manner as the Court may see fit, into the circumstances concerning the appeals in the cases entitled *Root Refining Company* v. *Universal Oil Products Company*, Appeals Nos. 5648 and 5546, and the connection of Morgan S. Kaufman therewith, all as partially developed in the testimony taken in the case of *United States of America*

*It was subsequently conceded by *Amici Curiae* that the mortgaged real estate constituted adequate security for the loan.

**Judge Denison died on May 27, 1942. From and after this date *Amici Curiae* shall be deemed to refer only to Messrs. Thiess and von Holst, unless otherwise indicated by the context.

v. *J. Warren Davis and Morgan S. Kaufman*, recently on trial in the United States District Court for the Eastern District of Pennsylvania.

"Our appearance before the Court will be on behalf of certain companies, including Globe Oil & Refining Company and Skelly Oil Company, against whom the decision in said case of *Root Refining Company* v. *Universal Oil Products Company* is being asserted as *res judicata* and as a judicial precedent.

"You are invited to attend if you see fit.

[Signed] Arthur C. Denison,
J. Bernhard Thiess,
Thorley von Holst."

Pursuant to said letter, your petitioner's said counsel of record appeared in the courtroom of the Circuit Court of Appeals for the Third Circuit at Philadelphia, Pennsylvania, at 3:30 P. M. on June 5, 1941; upon the bench were all of the then active Circuit Judges for the Third Circuit. Presumably, said Arthur C. Denison, J. Bernhard Thiess and Thorley von Holst had arranged for said hearing, inasmuch as the hearing was opened by Judge Denison as follows (v. I, p. 2):

> **"Mr. Denison:** At Your Honors' suggestion, I will read the letter which is the only present basis of this application."

Thereupon Judge Denison proceeded to read the above quoted letter addressed to petitioner's counsel of record, as an introduction to his further remarks.

After recounting the history of the *Root* litigation, Judge Denison described the aforesaid settlement between your petitioner and Root and stated that that settlement

"completely disposed of the controversy" and that "the [*Root*] case had become moot" (v. I, p. 6). He then described the legal position of himself and his co-applicants, as follows (v. I, pp. 7-8, 9):

> "Now, I should explain a little more fully the situation of the counsel here today who signed this letter. We were counsel for the defendant in the Root case. In a nominal way perhaps we still are. But Root and Mr. Hamilton representing the Root Company settled that case and they have no further interest in it at present.
>
> "I may properly say that on consultation with Mr. Hamilton, he said that in view of the present contract he has with the plaintiff which in many respects is a desirable contract, he dotesn't feel at liberty to his stockholders to ask to have that contract of settlement set aside.
>
> * * * * *
>
> *"While we do not represent the Root Company in making this suggestion today,** we do represent some of these other people defendants as to whom it is claimed that the decree in the Root case is an adjudication, so that these other defendants can no longer deny either the validity or the infringement of the patent."

Although Judge Denison pointed out that petitioner was claiming that the *Root* judgments were *res adjudicata* as to his clients, he repudiated the claim, stating (v. I, p. 14):

> "* * * we have always denied and we do deny that there was that participation by them in the Root cases that made them really parties, and, *we can't come in and say they were parties.*"

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*Italics supplied unless otherwise noted.

Judge Biggs inquired whether Judge Denison and his confreres were making an application to the court, to which Judge Denison replied (v. I, p. 13):

> "The frank answer to Your Honor's question is I don't know just what should be done. The Root case, itself, has been settled. As counsel for the Root Company we can't do anything. As counsel for these other companies against whom the thing is alleged to be an adjudication and which other companies the plaintiff claims were really defendants in this case—as representing those companies we could file a formal application, I suppose."

Counsel for your petitioner thereupon offered to consent, on behalf of your petitioner, to a reargument of the *Root* case on the merits before the Court of Appeals as then constituted,* provided Root would appear and reargue. Mr. Don Holst, one of Judge Denison's associates, responded to this offer as follows (v. I, pp. 25-6):

> "On the question of re-argument in so far as it bears on the Root situation, I was in conference with Mr. Hamilton of the Root Company lately, and they settled their litigation after long years of costly litigation, and their position, of course, is that they would not want to jeopardize their present position.
>
> "In other words, the Root Company would not for a moment consent to throwing the whole thing open again and taking their chances on a new adjudication where they might win or they might lose, and I did not understand Judge Haight's offer of a re-argument to include a statement if the decision went against Root again, that then Root would be

*At that time, each of the Circuit Judges for the Third Circuit who were in office in 1935 had either retired or resigned.

secure in the settlement which they made in 1939, and, of course—

"Mr. Haight: We will give them that.

"Mr. von Holst: With that understanding, of course, the situation is changed to that extent. My only position on that would be that there is no counsel present here authorized to speak on behalf of Root at this time in response to Judge Haight's offer. Otherwise, I don't change or modify anything that has been said heretofore, *because we do not, as we made plain in the opening, represent the Root Company before Your Honors.*"

At the conclusion of the hearing, Judge Biggs stated (v. I, p. 27):

"We think, Judge Denison, that you should embody in a written motion or a petition so that it may be formally on the records of this Court whatever relief it is that you seek, or what you desire by way of prayer or motion to have this Court do, and then the other side of the controversy may make an appropriate reply, and the whole matter may be one of record in which the Court may determine the issue."

Pursuant to this suggestion, Messrs. Denison, Thiess and von Holst filed, under date of June 18, 1941, a written petition as *Amici Curiae* (v. I, pp. 29-46) and a brief in support thereof (v. I, pp. 46-54).

Under date of June 25, 1941, one Arthur G. Logan,* another of the counsel of record for Root in the *Root* case until the time of the execution of the aforementioned settlement agreement and who was then attorney for Eastern

*Mr. Logan had also appeared at the June 5, 1941, hearing and generally concurred in the position taken by *Amici Curiae*.

States Petroleum Co., Inc., another licensee of your petitioner, filed a petition as *Amicus Curiae*, in which, after setting forth, among other things, the alleged interest of Eastern States Petroleum Co., Inc., he joined in the prayers set forth in the petition of Messrs. Denison, Thiess and von Holst (v. I, pp. 55-60).

Under date of July 9, 1941, your petitioner filed answers to the petitions of said *Amici Curiae* (v. I, pp. 61-76). *Amici Curiae* filed reply memoranda thereto (v. I, pp. 77-89), to which petitioner filed an answer (v. I, pp. 90-3).

Under date of November 26, 1941, the said Judges, purporting to act as the Circuit Court of Appeals for the Third Circuit, entered, upon the said application of *Amici Curiae*, an order (v. I, pp. 94-6) captioned in the said consolidated cause entitled "*Root Refining Company, Defendant-Appellant*, vs. *Universal Oil Products Company, Plaintiff-Appellee*", in which one Thomas Raeburn White, Esq., was appointed Master,

> "with authority to examine, investigate and to make and report to this court his findings and conclusions concerning the relationship and dealings, if any, between Universal Oil Products Company, the plaintiff-appellee above named, Morgan S. Kaufman, and former Circuit Judge J. Warren Davis, and any and all persons acting for or on behalf of any of them in connection with the above entitled causes and the entire subject matter of the prosecution and disposition of the said causes and in particular whether there was in connection therewith such fraud, corruption, obstruction or distortion of justice as tainted and invalidated the judgments rendered by this court in the above entitled causes on June 26, 1935."

The order also directed the Master (v. I, p. 95)

> "to request the Department of Justice to make available to him as an officer of this court the records, documents and other evidence in the possession of such Department, whether developed by its Bureau of Investigation in its inquiries or by the prosecuting attorneys of the Department in grand jury inquiries, or otherwise, bearing upon the matters hereby referred to him, and also to request (if such request be necessary) the Attorney General of the United States or the United States District Courts in which the said grand jury proceedings in the Cities of New York and Philadelphia took place, to make available to him as an officer of this court a stenographic transcript of the said proceedings."

Said order of November 26, 1941, was not entered in any case or controversy between adverse parties then pending before the said Court of Appeals, within the meaning of Article III, Sections 1 and 2 of the Constitution of the United States.

There were not then and are not now and have not been, at least since April 1, 1939 (the date of the settlement between Root and your petitioner), any adverse parties* in

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*At the hearing on June 5, 1941, above described, Judge Denison was careful to explain that neither he nor his associates nor their clients were parties to the *Root* case. Judge Biggs inquired (v. I, p. 14):

> "Judge Denison, in order that we may have this situation formally before us, you do represent certain persons who are directly concerned in the Root Refining case, the two cases to which you have referred, is that correct?"

To this Judge Denison replied (*ibid.*):

> "That is part of the truth. We have always denied on account of these other defendants—*we have always denied and we do deny that there was that participation by them*

the cause entitled "*Root Refining Company, Defendant-Appellant*, vs. *Universal Oil Products Company, Plaintiff-Appellee*", between which there existed a case or controversy capable of judicial determination by a court of the United States.

The investigation* directed by the said order of November 26, 1941, and conducted by the Master appointed thereby, did not constitute a case or controversy within the meaning of Article III, Sections 1 and 2 of the Constitution of the United States and presented no justiciable controversy between adverse parties capable of judicial determination by a court of the United States.

At the first hearing before the Master, on December 11, 1941 (v. I, pp. 97-101), no testimony was taken, but the

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in the Root cases that made them really parties, and we can't come in and say they were parties."

To the suggestion of Judge Biggs that Judge Denison and his confreres might "have a right to proceed in this matter amicus curiae", Judge Denison responded (v. I, pp. 14-5):

> "* * * but I know of no precedent for it, and such proceedings ordinarily are applications for a re-argument of the case, itself, and that very case is out of existence, it has been settled. That is the complication there. The problem is a difficult one."

The Master recognized the proceeding to be a mere investigation, for he stated at the second hearing before him (v. I, p. 133):

> "Well, I think as realists we must recognize, of course, that you gentlemen on either side have private interests that you are serving as well as the public interest.
>
> "On the other hand, the primary interest of the Court, I think, was public interest to make sure that its decision in this case had been, as it said, not tainted with fraud.
>
> "I do not think that the *investigation—for that is all it is—should be conducted strictly according to the rules of evidence in litigation.*"

Master advised counsel that he would endeavor to obtain access to the records described in the said order dated November 26, 1941.

Pursuant to the purported authority contained in the order of November 26, 1941, the Master thereafter personally examined, in the office of the United States Attorney for the Southern District of New York, all of the records in the possession of that official, including, among others, the report of an investigator of the Federal Bureau of Investigation, bank records, statements made by Judge Davis' cousin, the latter's son, and Judge Davis himself; also written statements prepared and submitted to the United States Attorney by Davis, his wife and his counsel, the grand jury testimony of Davis and Kaufman, and "many other reports and statements" (v. I, p. 110),—all for the purpose of ascertaining if anything was contained in them which, he thought, might throw light upon the matters then under investigation. The Master made extracts of "all matters which seem to me to be material to the present investigation" (v. I, p. 113).

Upon the conclusion of his said independent investigation, the Master submitted for the examination of *Amici Curiae* and counsel for your petitioner the portions of the material above described which he had examined and which he had determined "might throw any light upon the issues raised in the present investigation" (v. I, p. 109).

At the second hearing, on April 16, 1942 (v. I, pp. 102-39), the Master read into the record a list and description of the documents, records, grand jury testimony, F. B. I. reports and other writings which he had examined and some of which he had submitted to counsel.

At the same hearing, the Master advised counsel that he had (v. I, pp. 113-4)

> "procured a copy of the record of the Grand Jury sitting in Philadelphia which investigated the affairs of Judge Davis and Mr. Kaufman, but I have not yet had an opportunity to examine it. I have agreed with Judge Biggs that I would examine this record, and if I found anything in it material to the present inquiry it should be used in this proceeding. If I find nothing which seems to me to have a bearing on the issues presented in this investigation, I will return the record to the proper parties."

Following the Master's description of his own investigation and what he proposed to do with respect to grand jury proceedings in Philadelphia, application was made by the *Amici Curiae* for the issuance of subpoenas *duces tecum* (v. I, pp. 114-20).

In the course of the discussion which followed of the powers of the Court of Appeals and the Master and of the purposes of the order of November 26, 1941, counsel for your petitioner cogently stated petitioner's position with respect to the investigation as follows (v. I, pp. 121-3):

> "Mr. Harris: * * * To the extent that the amici curiae are really litigants, or to the extent that any finding by His [Your] Honor or by the Circuit Court of Appeals might affect property or other rights of Universal Oil Products Company, or in any wise affect the merits of the two Root cases, although we entertain in our own minds no doubt as to the propriety of everything which has transpired and that will be duly shown, nevertheless, we

feel we should be somewhat derelict in our duties to our client if we did not make upon the record an objection to the jurisdiction of the Circuit Court of Appeals, and, consequently, of Your Honor, to hear and determine in a summary and informal manner, and in a proceeding which doesn't amount to a controversy or suit prescribed by the Constitution of the United States, matters which affect or might affect property rights of our client and a judgment in its favor in the Court in this circuit.

"* * * and therefore, purely for the sake of advising Your Honor and counsel, [I] formally object in so far as this proceeding is other than an investigation by the Court looking toward vindication of the Court's honor, or otherwise; object that the Court is without jurisdiction to take testimony or to take any action, and that the order under which these hearings are held is likewise without jurisdiction, and without going into the details I urge that the investigation and order are not made in a case or controversy, as that case is defined in Sections 1 and 2, Article 3, of the Constitution of the United States.

"That there are not now before the Court or the Special Master any adverse parties so that any case or controversy can be said to exist.

"That there is not now before the Special Master any justiciable controversy over which the Circuit Court of Appeals or the Special Master has jurisdiction.

"That the persons designated in the order of the Circuit Court of Appeals herein as friends of the Court are not adverse parties technically, and have no standing as adverse parties in the cases of Root Refining Company, Defendant-Appellant against Universal Oil Products Company, Plaintiff-Appellee, Nos. 5546 and 5648.

"That the order of the Circuit Court of Appeals herein and hearings before the Special Master are beyond the jurisdiction of the Circuit Court of Appeals because the cases above referred to were disposed of by the Circuit Court of Appeals at a term other than the term at which the order herein was made, and, finally, that the Circuit Court of Appeal at the time when the order herein was made had no jurisdiction whatever in the cases above referred to, because the term in which said Court had decided said cases and handed down its mandate had previously come to an end, and these objections I make without limiting the generality of my general objection."

Following the foregoing colloquy and statements of objection to jurisdiction, the Master observed that the "investigation" should not "be conducted strictly according to the rules of evidence in litigation" (v. I, p. 133).

Notwithstanding this lack of jurisdiction, the Master directed that the hearings proceed and that subpoenas issue at the request of the *Amici Curiae*.

Commencing on the 12th day of May, 1942,* and continuing from time to time thereafter until April 2, 1943, hearings were held before the Master, at which witnesses, called exclusively by *Amici Curiae*, were interrogated and numerous exhibits offered and received in evidence. During the course of the hearings, a transcript of much of the testimony adduced in the criminal trials entitled *"United States of America* v. *J. Warren Davis and Morgan S. Kaufman"*, to which your petitioner was not a party, was received in evidence, as was a transcript of the testimony

*Mr. Logan did not participate in the investigation after May 12, 1942.

given by various witnesses, including a part of the testimony of the Honorable John Biggs, Jr., Senior Circuit Judge, before Federal grand juries either in New York or in Philadelphia. From time to time petitioner noted its objection* to the non-judicial procedure adopted by the

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*Addressing himself to the independent investigation by the Master, counsel for the petitioner noted the following objection upon the record (v. I, pp. 123-4):

> "Mr. Harris: * * * Now that our objections may be said to have substance, I should point out that under the order, I take it Your Honor may make your own investigation, may consider proceedings before the Grand Jury both in New York and here, and may make such further and other investigation as to Your Honor seems proper. I think that is entirely proper in such a proceeding, to inquire into the honor of those previously sitting on this Court.
>
> "However, if it were to involve any property rights of our clients, including the validity of any judgment, then, of course, none of this evidence would be admissible in a plenary action. We would have a right to require it to be sworn to and delivered in open court with an opportunity for cross-examination, and all the rights which litigants are guaranteed in a controversy or case under the Constitution of the United States."

Later in the proceeding, when the testimony of one Behrens before the Federal grand jury was offered in evidence, the following colloquy took place (v. I, p. 250):

> "Mr. Harris: With the understanding previously noted, which I understand holds good all through the hearing without further notation, that while we welcome this informal method of producing proof for the purpose of an investigation of the probity of the Court, we do not recognize it as binding on Universal Oil Products Company in so far as it may affect any rights or property it may have. This is not a proper proceeding for that.
>
> "Mr. Thiess: There has been a general exception to this on the record at the present time.
>
> "The Master: That is understood."

Master in so far as the proceedings purported to furnish a basis for any adjudication binding upon your petitioner or which would affect its property rights or judgments.

Subsequently, the Master caused to be filed as a part of the record of the investigation, a memorandum (v. VI, pp. 2240-2306) describing in further detail certain of the documents which he had examined in the office of the United States Attorney for the Southern District of New York and setting forth extracts from the testimony of Morgan S. Kaufman and J. Warren Davis before the Federal grand jury there. These extracts were interspersed with running comments of the Master. Though not a part of said memorandum, the Master also caused to be included in the record of the investigation, the testimony of Judge Davis' cousin before the Federal grand jury in New York (v. VI, pp. 2306-2487).

At the conclusion of the hearings before the Master, briefs and proposed findings of fact and conclusions of law were submitted by *Amici Curiae* and by counsel for your petitioner (v. VIII, pp. 3551-3600). Petitioner again challenged the jurisdiction of the Court of Appeals and of the Master by requesting (and arguing for, in its brief) the following conclusion of law (v. VIII, p. 3596):

> "The instant proceeding does not constitute a case or controversy within the meaning of Article III, Section 1 of the Constitution."

This conclusion the Master refused (*ibid.*).

After a consideration of the issues, the Master rendered a report (v. VIII, pp. 3516-3600) in which he concluded (v. VIII, p. 3550):

> "Upon the whole record I am forced to the conclusion that there was in connection with this case

such fraud as tainted and invalidated the judgments rendered by this court therein on June 26, 1935."

The ultimate conclusion of the Master was reached purely by inference. There was no direct evidence either that Judge Davis was bribed or improperly influenced in any way in his decision in the *Root* case or that your petitioner was in any wise connected with any fraudulent conduct or had any knowledge of the loan to Judge Davis' cousin. In the last analysis, the Master may have been influenced to a great extent (a) by his examination of unsworn records in the office of the United States Attorneys who were prosecuting Davis, Fox and Kaufman, and (b) by a consideration of the alleged dealings between Davis, Fox and Kaufman in the Fox bankruptcies which were unknown to your petitioner and which occurred a year after the decision in the *Root* case, the payments by petitioner to Kaufman, and Kaufman's loan to Judge Davis' cousin. During the pendency of the investigation, an atmosphere of disgust pervaded the Philadelphia bench and bar as a result of the disclosures in connection with the Fox bankruptcy. It is difficult, therefore, to imagine that the Master could have been unaffected by this atmosphere.

Under date of November 20, 1943, your petitioner filed appropriate objections and exceptions to the Master's report (v. VIII, pp. 3615-3637).

By an order, dated February 28, 1944, the Court of Appeals directed that a hearing be had upon the question of the confirmation or rejection of the report of the Master. Briefs were exchanged and oral argument heard and, under date of June 15, 1944, the Court of Appeals entered an order, captioned *"Universal Oil Products Com-*

pany v. Root Refining Company, Appellant" which provided, in part, as follows (v. IX, p. 3662):

> "Upon consideration thereof the Court hereby dismisses the exceptions and adopts the findings of fact and conclusions of law of the Special Master as the findings of fact and conclusions of law of the Court.
>
> "And it is ordered that the judgments of this Court in the above entitled causes entered on June 26, 1935 be and the same are hereby vacated and that the mandates issued on October 30, 1935 to the District Court be recalled. The Clerk is directed thereupon to restore the causes to the argument list for reargument."

The causes have never been reargued pursuant to that order.

On or about July 24, 1944, J. Bernhard Thiess and Thorley von Holst, as *Amici Curiae*, made an application captioned in the *Root* case for an order directing (v. IX, pp. 3663-4):

> "1. That the expenses and compensation of Thomas Raeburn White, Special Master, acting under the Order of this Court entered November 26, 1941, paid by the *Amici Curiae* in the first instance and allowed to the Master by the Order of this Court entered December 14, 1943, be taxed against Universal Oil Products Company and in favor of said *Amici Curiae* in the amount of $28,481.91.
>
> "2. That the costs and disbursements paid by the said *Amici Curiae* during the course of the investigation by the Master under the Order of November 26, 1941, be taxed against Universal Oil Products Company and in favor of said *Amici Curiae* in the amount of $15,488.20.

"3. That the other and additional expenses incurred by the *Amici Curiae* during the course of the said investigation be taxed against Universal Oil Products Company and in favor of said *Amici Curiae* in the amount of $11,997.87, or such part thereof as the Court may deem proper.

"4. That a reasonable attorney's fee on acount of the services of the said *Amici Curiae* and of counsel associated with them during the course of the said investigation be taxed against Universal Oil Products Company and in favor of said *Amici Curiae*.

"5. That the Court set a day certain for the hearing of this Motion."

Upon the return of said motion, *Amici Curiae* stated that they had received from certain of their corporate clients, not including Root, the expenses, costs, disbursements and counsel fees, which were the subject of their motion, and that such fees, costs and allowances as might be granted to them would serve to reimburse their clients for such expenditures.

Upon the oral argument of the aforesaid motion and in the briefs submitted by counsel for the petitioner in opposition thereto, your petitioner again challenged the jurisdiction of the Court of Appeals to act in the premises and to enter any judgment against your petitioner in favor of *Amici Curiae* or their clients, upon the ground that the proceedings, while captioned in the said consolidated cause entitled *"Root Refining Company, Defendant-Appellant,* vs. *Universal Oil Products Company, Plaintiff-Appellee"*, did not constitute a case or controversy within the meaning of Article III, Sections 1 and 2 of the Constitution of the United States; that there were no adverse parties; that

here was no justiciable controversy; and that the above ntitled cause was moot.

Under date of December 29, 1944, the Judges of the ourt of Appeals handed down opinions granting the mo- ion of *Amici Curiae*, with the exception of a small item of 1,361.41 representing expenditures made by *Amici Curiae* rior to the date of the order appointing the Master (v. IX, p. 3685-91). The majority (the Honorable John Biggs, r., Herbert F. Goodrich and Gerald McLaughlin) held hat (v. IX, p. 3689):

> "Accordingly *amici* and their associates will be allowed the sum of $100,000 as their reasonable compensation and the amount of $54,606.57 as reimbursement for their out-of-pocket expenses."

he minority (the Honorable Charles Alvin Jones and lbert Branson Maris) held that the allowance to *Amici uriae* as compensation for their services in the investiga- on should be limited to an amount equal to the fee paid he Special Master, namely, $25,000 (v. IX, pp. 3689-91).

The said opinions make no comment and contain no iscussion of the subject of jurisdiction, except the follow- ng in the majority opinion (v. IX, p. 3688):

> "The members of the court are agreed that the court has power to award the compensation for their services to the court, to be paid by the plaintiff, and that under the circumstances of this case the *amici* are entitled to be awarded reasonable compensation for those services."

Under date of December 29, 1944, the Court of Appeals ntered an order directing "that the sum of $154,606.57 e and the same hereby is taxed against Universal Oil Prod- cts Company together with the costs of the proceedings in

this Court to set aside the judgments rendered by this Court in the above entitled causes [the *Root* case] on June 26, 1935" (v. IX, pp. 3692-3).

Since the entry of the order of December 29, 1944, said *Amici Curiae* have proposed that the Court of Appeals enter a further order in said investigation, directing the dismissal of the *Root* case by the District Court as moot. The Clerk of the Court of Appeals has notified your petitioner that the members of that court have in mind the possibility of a direction to the District Court to dismiss said *Root* case for unclean hands.

Since the entry of the order of June 15, 1944, one of petitioner's former licensees, to wit, Eastern States Petroleum Co., Inc., which is represented by said Arthur G. Logan, Esq., has instituted suit in the Chancery Court of the State of Delaware, in which it has alleged that it was induced to enter into a license agreement as a result of representations by your petitioner that the judgment of the Circuit Court of Appeals for the Third Circuit in the *Root* case was a valid judgment. The order of June 15, 1944, is therein alleged to be an adjudication of the issue of fraud binding upon your petitioner.

Skelly Oil Company recently made an application to the Circuit Court of Appeals for the Third Circuit in an action entitled "*Universal Oil Products Company* vs. *Skelly Oil Company*" for an order recalling the mandate issued by said Circuit Court of Appeals in that case, affirming a decree of the District Court finding infringement and ordering an accounting, and for the issuance of a new mandate directing the District Court, among other things, to enter final judgment, denying to plaintiff any recovery of profits or damages, upon the ground that your peti-

tioner had, by citing the decision in the *Root* case as a judicial precedent to the Master who conducted the accounting, been guilty of unclean hands. Skelly merely proved the entry of said order of June 15, 1944, without attempting to prove the invalidity of the *Root* judgments. The Circuit Court of Appeals denied the said relief but granted leave to the District Court to consider the alleged fraud in the *Root* case in relation to the relief sought in the *Skelly* case. Skelly has applied to the District Court in accordance with the leave granted to the District Court and that proceeding is pending before the Honorable John Biggs, Jr. sitting in the District Court.

Several other of your petitioner's licensees have threatened to bring actions against your petitioner to attempt to rescind license agreements entered into with it and to recover the license fees paid thereunder, upon the ground that they were induced to enter into such license agreements by alleged fraudulent misrepresentations upon the part of your petitioner as to the validity of the judgments of the Circuit Court of Appeals for the Third Circuit in the *Root* case. In such cases, your petitioner is informed and believes that such claimants propose to rely merely on said order of June 15, 1944, to prove fraudulent inducement.

In the premises, all such licensees should be required to establish the invalidity of the *Root* judgments, if they be invalid, through the presentation of competent, legal evidence offered and received in a recognized judicial proceeding, before such invalidity should be held to be binding upon your petitioner.

Your petitioner does not seek, by a mere legal technicality, to be relieved of the just penalty of any fraud of which it has been proven to be guilty; it has not been

found guilty by due process of law. Indeed, your petitioner believes that in a legally constituted proceeding, where the ordinary rules of evidence were observed, where an atmosphere of hostility were lacking, and where the party charging fraud were obliged to prove that charge by a fair preponderance of the evidence and, above all, where the trier of the fact would not have access to sources of information denied to your petitioner,—no finding of fraud or corruption touching your petitioner could be made. Your petitioner respectfully submits that it is entitled, before the odium of corrupting the judiciary and all the concomitants thereof (such as charges in other proceedings of unclean hands) attach to it, to have a plenary trial of the issues in accordance with established legal principles. It has not had such a trial to-date.

QUESTIONS PRESENTED

1. Did the instant investigation constitute a case or controversy within the meaning of Article III, Section 2, of the Constitution of the United States so as to permit the Court of Appeals to enter any decree or order or take any action of any nature whatsoever therein binding upon your petitioner or affecting its property rights or judgments.

2. Did *Amici Curiae*, participating in the instant investigation as purported friends of the court, constitute adverse parties within the meaning of Article III, Section 2, of the Constitution of the United States.

3. Did the Court of Appeals have jurisdiction to enter the order of December 29, 1944.

4. Did the Court of Appeals have jurisdiction to enter in the instant proceeding any decree or order or take any

action of any nature binding upon your petitioner as a result, or as a part, or in pursuance, of an investigation in a cause which had been rendered moot by reason of the settlement thereof by the parties thereto, particularly since the former, actual and only adverse party failed and refused to appear or participate, but, on the contrary, signified to that court its desire that the finality of the case be undisturbed.

5. Did the Court of Appeals have jurisdiction to allow to *Amici Curiae* the compensation and expenses specified in the order of December 29, 1944, and to direct that the same be taxed against petitioner.

6. Did the entry of the order of December 29, 1944, as a result of an investigation in which the established rules of evidence were disregarded, deprive petitioner of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Exercise of the power of this Court to grant the writ of *certiorari* herein prayed is sought upon the following grounds:

1. The Court of Appeals, in assuming jurisdiction of the instant proceeding which did not constitute a case or controversy, acted in a manner which is untenable and is in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeal.

2. The Court of Appeals, in assuming jurisdiction of the instant proceeding in which there were no adverse parties asserting adverse, legally cognizable interests, acted

in a manner which is untenable and is in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeal.

3. The Court of Appeals, in assuming jurisdiction of the instant investigation, although the cause in which it was conducted had become moot by reason of a settlement agreement entered into between the parties thereto, acted in a manner which is untenable and is in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeal.

4. The Court of Appeals was wholly devoid of any jurisdiction or power to direct the payment by your petitioner of compensation to and the expenses of *Amici Curiae*, and the action of said Court of Appeals in entering the order directing such payment is in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeal.

5. The question of whether the Court of Appeals, in an investigation in which the recognized rules of evidence were disregarded and which was conducted in a proceeding to which there were no adverse parties asserting adverse, legally cognizable interests, had jurisdiction to enter orders binding upon petitioner and purporting to affect its property rights or judgments, is one of great public importance and should be resolved by this Court.

6. The action of the Court of Appeals, in entering the order of June 15, 1944, which vacated the prior judgments of that court, recalled its mandate and directed a reargument of the *Root* case, and which purported to afford a basis for the entry of the order of December 29, 1944—all in an investigation conducted in disregard of the estab-

lished rules of evidence—is untenable and is probably in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeal.

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all proceedings in the investigation conducted in the consolidated cause numbered and entitled in its Docket Nos. 5648 and 5546, *Root Refining Company, Defendant-Appellant*, vs. *Universal Oil Products Company, Plaintiff-Appellee*, and that said order of the Circuit Court of Appeals for the Third Circuit, entered December 29, 1944, may be reversed by this Court and that your petitioner may have such other and further relief in the premises as to this Court may seem just; and your petitioner will ever pray.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner.

By: THOMAS W. BOWERS
Chairman of the Board of Directors.

ROBERT T. MCCRACKEN,
RALPH S. HARRIS,
Attorneys for Petitioner.

JOHN R. MCCULLOUGH,
of Counsel.

March 16, 1945.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

THOMAS W. BOWERS, being duly sworn, deposes and says: that he is Chairman of the Board of Directors of Universal Oil Products Company, the petitioner named in the foregoing petition; that he has read the foregoing petition and that the same is true to the best of his knowledge, information and belief.

THOMAS W. BOWERS

Sworn to before me this
16th day of March, 1945.

EDITH STENBERG, Notary Public, Nassau Co.
Nassau County Clerk's No. 1815, Kings County
Clerk's No. 335, Kings County Reg. No. 571-S-6
N. Y. Co. Clk's No. 1304, N. Y. Co. Reg. No. 767-S-6
My Commission expires March 30, 1946

IN THE

Supreme Court of the United States

October Term, 1944

No.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

vs.

ROOT REFINING COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions and Orders Below

The report of the Master, rendered pursuant to the order of the Court of Appeals, dated November 26, 1941, has not been reported, but is set forth at Volume I, Page 94 of the transcript of the record filed herewith.

The order of the Court of Appeals, dated June 15, 1944, is set forth at Volume IX, Page 3661, of the transcript of the record filed herewith.

The opinion of the Court of Appeals, filed December 29, 1944, has not been reported, but is set forth at Volume IX, Page 3685 of the transcript of the record filed herewith.

The order of the Court of Appeals, dated December 29, 1944, is set forth at Volume IX, Page 3692 of the transcript of the record filed herewith.

Jurisdiction

The facts supporting the jurisdiction of this Court are set forth in the petition.

Cases believed to sustain the jurisdiction of this Court are as follows:

Trade Comm'n v. *Goodyear Co.*, 304 U. S. 257;
Aetna Life Ins. Co. v. *Haworth*, 300 U. S. 227;
Willing v. *Chicago Auditorium* 277 U. S. 274.

Statement of Facts

The facts are sufficiently set forth in the petition.

Specification of Errors

If the writ is granted, petitioner will urge that the Court of Appeals in the instant proceeding erred in the following respects:

1. In refusing to hold that the instant proceeding did not constitute a case or controversy within the meaning of Article III, Sections 1 and 2, of the Constitution of the United States.

2. In refusing to hold that there were, in the instant proceeding, no adverse parties with adverse interests.

3. In entering the order, dated November 26, 1941, captioned in the consolidated cause entitled "*Root Refining Company, Defendant-Appellant*, vs. *Universal Oil Products Company, Plaintiff-Appellee*", directing that an investigation be conducted by the Master and that, in such investigation, established rules of evidence be disregarded.

4. In entering the orders, dated June 15, 1944, and December 29, 1944.

5. In refusing to hold that the Court of Appeals had no power to award any counsel fees or expenses to *Amici Curiae* in the instant proceeding.

6. In refusing to hold that *Amici Curiae* were not entitled to any counsel fees and expenses in the instant proceeding.

7. In awarding to *Amici Curiae* compensation and expenses, in disregard of the limitations upon its power to grant costs imposed by statute, the orders promulgated by this Court, and the Rules adopted by the Court of Appeals pursuant thereto.

POINT I

The Court of Appeals, in assuming jurisdiction in the instant proceeding, acted contrary to the decisions of this Court and other Circuit Courts of Appeal.

The jurisdiction of courts of the United States is limited by the Constitution to cases or controversies (Constitution, Article III, Sections 1, 2). The case or controversy must be actual. *Coffman* v. *Breeze Corporations, Inc.*, 89 L. Ed. 255, decided January 2, 1945; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227; *Willing* v. *Chicago Auditorium*, 277 U. S. 274; *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70; *New Jersey* v. *Sargent*, 269 U. S. 328; *Muskrat* v. *United States*, 219 U. S. 346; *Smith* v. *American Asiatic Underwriters, Federal*, 9 Cir., 127 F. (2d) 754. The powers of the court invoked must be strictly judicial in their nature. *Muskrat* v. *United States*, 219 U. S. 346, 356; *Lord* v. *Veazie*, 8 How. 251; *Osborn* v. *U. S. Bank*, 9 Wheat. 738. An absolute *sine qua non* of an actual con-

troversy is the initial and continued existence of adverse parties asserting adverse interests. *Muskrat* v. *United States*, 219 U. S. 346; *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300; *Cleveland* v. *Chamberlain*, 1 Black 419; *Lord* v. *Veazie*, 8 How. 251; *O'Donnell* v. *United States*, 9 Cir., 91 F. (2d) 14. The interest asserted must be a personal and a private interest, as opposed to one asserted *pro bono publico*. *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70; *New Jersey* v. *Sargent*, 269 U. S. 328; *Massachusetts* v. *Mellon*, 262 U. S. 447; *Fairchild* v. *Hughes*, 258 U. S. 126; *State of Georgia* v. *Stanton*, 6 Wall. 50; *Osborn* v. *U. S. Bank*, 9 Wheat. 738.

Judged by these principles, the instant proceeding in which the Court of Appeals purported to act and to enter the several orders set forth in the petition was not a case or controversy under the Constitution and, consequently, the Court of Appeals was wholly without power to act in a judicial capacity therein.

Although the action taken was captioned in the *Root* case, no controversy then existed between Root and Universal, the only parties thereto. Root had settled its controversy with Universal (v. I, pp. 6, 13, 24), and declined to make itself a party or to be made a party, concededly preferring the settlement to the hazard of reopening the case and reargüing the appeal (v. I, pp. 8, 25-6); indeed, Root, though counsel for petitioner offered to preserve the settlement and consent to the setting aside of the judgments and the reargüing of the appeals (v. I, pp. 25-6), showed no disposition to avail itself of this opportunity and never, to this date, has appeared or asserted any further right or interest in that case.

Thus, any controversy which may have previously existed between Root and Universal had become moot prior to the commencement of the instant investigation. The Court of Appeals therefore, would have been without power to enter a binding decree in the present proceeding, even upon the application of Root. *St. Pierre* v. *United States*, 319 U. S. 41; *Alejandrino* v. *Quezon*, 271 U. S. 528; *Brownlow* v. *Schwartz*, 261 U. S. 216; *American Book Co.* v *Kansas*, 193 U. S. 49; *Mills* v. *Green*, 159 U. S. 651.

If this be so, obviously no such decree could be validly entered at the instance of *Amici Curiae*, who expressly disavowed representing any party to the captioned litigation (v. I, pp. 9, 13-4, 26). Although they admitted representing parties against which petitioner had asserted, in other litigation, that the *Root* judgments were *res adjudicata* (v. I, pp. 9, 13-4), *Amici Curiae* disclaimed that their clients were bound by such adjudication (v. I, p. 14) and thus put themselves in the position of complete strangers to the *Root* case. *Amici Curiae* as individuals had no legally cognizable interest in the suit; they represented no parties who even claimed to have such an interest. They appeared, by their own admission, solely as attorneys-at-law who were interested in aiding the court in an investigation *pro bono publico* (v. I, pp. 9-13) and whose clients might gain, from the setting aside of the *Root* judgments, exemption from the claim in suits against them by petitioner that the *Root* judgments were *res adjudicata* of their liability (v. I, pp. 9, 13). *Amici Curiae*, in their initial presentation of themselves to the Court of Appeals on June 5, 1941, expressed the gravest doubt as to what, if any, relief they were legally entitled (v. I, pp. 12-7, 24-8).

In a very real legal sense *Amici Curiae*, far from commencing or intervening in a legally justiciable case or controversy under the Constitution, were mere interlopers.

If then *Amici Curiae*, in instituting this purported *original* proceeding in the Court of Appeals, did not set in motion the machinery of arbitrament of a legally justiciable controversy under the Constitution, and if, in the absence of adverse parties and such an actual controversy, the Court of Appeals was without jurisdiction to enter a judgment or to tax costs, what then was the function of the proceeding? It appears that it could have been no more—and was recognized by the Master as being no more (v. I, p. 133)—than an investigation by the Court of Appeals of its membership and of officers of the court practicing before it. We may concede, *arguendo*, that the Court of Appeals had such an inherent power. But this is very far from conferring upon the Court of Appeals jurisdiction to determine—particularly in the informal, non-judicial mode adopted by the Master—whether or not the judgments in the *Root* case were or were not tainted with fraud. We submit most earnestly that that court was without power to impugn those judgments in an *original* proceeding commenced by non-parties to the action who had no legally cognizable interest in the controversy and, therefore, could not become parties even as intervenors.

The order of the Court of Appeals, entered November 26, 1941, by which the Master was appointed, recognized by its very terms the non-justiciable nature of the controversy. It invested the Master with authority to "examine" and "investigate" and authorized and directed him (v. I, p. 95)

> "to request the Department of Justice to make available to him as an officer of this court the records, documents and other evidence in the possession of such Department, whether developed by its Bureau of Investigation in its inquiries, or by the prosecuting attorneys of the Department in grand jury inquiries, or otherwise, bearing upon the matters hereby referred to him, and also to request (if such request be necessary) the Attorney General of the United States or the United States District Courts in which the said grand jury proceedings in the Cities of New York and Philadephia took place, to make availabl to him as an officer of this court a stenographic transcript of the said proceedings."

As previously stated, the Master himself recognized that the proceeding was non-judicial and the controversy non-justiciable, for he observed (v. I, p. 133):

> "I do not think that the *investigation**—for that is all it is—should be conducted strictly according to the rules of evidence in *litigation*."

We submit that the investigation, apart from the power of the Court of Appeals to discipline an officer of the court, was no more judicially cognizable than a Congressional investigation would be. In the case of *In re Pacific Ry. Com'n.*, 32 Fed. 241 (cited and quoted with approval by this Court in *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227), it appeared that Congress had ordered an investigation of certain railroads and had authorized the Commissioners to seek aid of the Federal courts in carrying out their investigation. The Commissioners asserted that they were not bound by rules of evidence in the course of their investigation (just as the Master did in the proceeding

*All italics supplied unless otherwise noted.

under attack) and received *ex parte* statements and information of every character which they deemed relevant to the inquiry (identically as the Master did in the proceeding under attack [v. I, pp. 100-1, 102-13; v. VI, pp. 2240-2306; v. VIII, pp. 3518-9]).

The Circuit Court declined to aid or implement such a proceeding, particularly one in which the rules of evidence applicable to a legal court proceeding had been disregarded, Mr. Justice Field (then on Circuit) saying (p. 258):

> "The federal courts, under the constitution, cannot be made the aids to any investigation by a commission or a committee into the affairs of any one. *If rights are to be protected or wrongs redressed by any investigation, it must be conducted by regular proceedings in the courts of justice in cases authorized by the constitution.*"

As we have previously urged, petitioner does not seek to save the *Root* judgments; it has consented that they be set aside and the cases reargued *de novo* even though the Court of Appeals had no power to set them aside in the instant proceeding. Petitioner still consents that they may be set aside. Of course, petitioner realizes that it cannot confer jurisdiction upon the Court of Appeals by such a consent and the offer to set aside, therefore, was necessarily predicated upon the other party to the original controversy, namely, Root, joining in the request and taking advantage of petitioner's offer to it to set aside the settlement made with Root, set aside the judgments, reargue the appeals and preserve to Root all of the advantages of the settlement in the event the Court of Appeals should again confirm the judgment of the District Court. The failure of Root to avail itself of this offer merely emphasizes the lacuna of

adverse parties necessary to the existence of a justiciable case or controversy.

Petitioner most earnestly submits, therefore, that, until a controversy legally cognizable by the courts has been commenced and until a trial of the issues therein has been conducted in accordance with the recognized principles of law governing such cases, it should not be tainted with an *adjudication* of fraud. It is prepared to litigate such a case upon the merits in accordance with law and to be bound by the outcome thereof. To the time of the writing of this brief, it has not had its constitutional day in court.

POINT II

The Court of Appeals, in directing the payment by your petitioner of the compensation and expenses of *Amici Curiae*, acted contrary to the decisions of this Court and of other Circuit Courts of Appeal.

Since the instant proceeding did not constitute a legally cognizable case or controversy of which the Court of Appeals could take jurisdiction, such court was manifestly without power to enter an order therein directing the payment by your petitioner of $154,606.57 as compensation to and expenses of *Amici Curiae*. It is well established that if a federal court is without jurisdiction to hear and determine a matter upon the merits, it lacks jurisdiction for all purposes, including the entry of a judgment for costs. Indeed, this Court has held that where the court lacks jurisdiction of a cause on the merits, it may not award costs even to the party successfully asserting the lack of jurisdiction. *Lion Bonding Co. v. Karatz*, 262 U. S. 640; *Citizens' Bank v. Cannon*, 164 U. S. 319. See also *Smyth v. Asphalt Belt Ry.*, 267 U. S. 326; *Blacklock v. Small*,

127 U. S. 96; *Humboldt Lovelock Irr. Light & Power Co. v. Smith*, 28 F. Supp. 421 (D. C. Nev.).

The Court of Appeals, therefore, was without jurisdiction or power to enter its order of December 29, 1944, directing that *Amici Curiae* be allowed the sum of $100,000 as compensation for their services in the instant investigation and the sum of $54,606.57 as expenses incurred by them in such investigation, and ordering that the total sum of $154,606.57 be taxed against your petitioner, together with costs

Even if it be assumed, *arguendo*, that the Court of Appeals had jurisdiction to enter its order of December 29, 1944, no authority, federal or otherwise, has been found which sanctions the allowance of counsel fees and expenses to an *amicus curiae*. Existing precedents are quite to the contrary. *Lake & Co., Inc. v. King County*, 4 Wash. (2d) 651, 104 P. (2d) 599; *cert. den.* 311 U. S. 715; *Kraus v. State*, 102 Neb. 690, 169 N. W. 3. In the present investigation *Amici Curiae* concededly represented private interests, not parties to the *Root* case (v. I, pp. 3, 9; v. IV, pp. 1494-5). It is to these clients, in whose interests *Amici Curiae* instituted this investigation, that the latter must look for compensation.

Again assuming, *arguendo*, that the Court of Appeals had jurisdiction to enter its order of December 29, 1944, its award of counsel fees and expenses to *Amici Curiae* is contrary to statute and to the decisions of this Court and of other Circuit Courts of Appeal.

By Act of February 19, 1897, 28 Stat. 536, c. 263, 28 U. S. C. A. §543, Congress, in effect, granted to this Court the power to fix the costs and fees in each Circuit Court of Appeals. Pursuant thereto, this Court promulgated an

order, effective March 15, 1941, establishing a table of fees and costs for the Circuit Courts of Appeal which may not be exceeded by those courts. In conformity with such order, Section 8 of Rule 37 of the Rules of the Circuit Court of Appeals for the Third Circuit specifies the "fees and costs" which have been established by that court. The compensation and expenses allowed to *Amici Curiae* by the order of the Court of Appeals, entered December 29, 1944, grossly exceed those provided by the order of this Court, effective March 15, 1941.

If it should be held, despite the foregoing statute and order of this Court, that the Court of Appeals is vested with the equitable power of a federal district court to grant counsel fees and costs between solicitor and client, such exceptional allowances are limited to cases where a fund, in the hands of the court, has been created or preserved by a party to the litigation for the benefit of himself and others similarly situated. In these instances, the allowance is a charge upon the fund, and not against the adverse party. *Trustees* v. *Greenough*, 105 U. S. 527; *Gold Dust Corporation* v. *Hoffenberg*, 2 Cir., 87 F. (2d) 451; *Standard Lumber Co.* v. *Interstate Trust Co.*, 5 Cir., 82 F. (2d) 346, *cert. den.* 299 U. S. 545.

In this investigation, *Amici Curiae* have neither created nor preserved any fund on which counsel fees and expenses may be made a charge. They have represented no one but their own clients, and have not benefited Universal, its stockholders or creditors. Under these circumstances, they must look for compensation and reimbursement to those whom they have represented and who have enjoyed the fruits of their labors.

POINT III

The question here involved is of public interest and should be resolved by this Court.

The propriety of the Court of Appeals conducting the instant investigation captioned in the consolidated cause entitled *"Root Refining Company, Defendant-Appellant, vs. Universal Oil Products Company, Plaintiff-Appellee"*, at the behest of attorneys termed *Amici Curiae*, without the presence of one of the two parties to the original litigation, is a matter of public interest. In ordering the investigation in question and in directing the Master in the conduct of that investigation to examine grand jury minutes, *ex parte* statements and other material, whether prejudicial or not, at his own pleasure and without affording counsel for your petitioner an opportunity to examine such evidence, and in entering an order upon findings of fact which may well have been based, at least in part, upon such evidence, the Court of Appeals adopted a procedure so contrary to accepted standards of judicial action as to constitute a deprivation of your petitioner's property without due process of law and require, in the public interest, a review by this Court.

CONCLUSION

For the foregoing reasons, it is submitted that the petition should be allowed and the order of December 29, 1944, purported to have been entered by the Circuit Court of Appeals for the Third Circuit in the instant proceeding should be reviewed and reversed.

Respectfully submitted,

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